IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-759

CECIL L. KINTY, d/b/a KINTY TRUCKING COMPANY,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, *Respondent.*

RUTH M. KITTLE, Individually and as Administratrix With Will Annexed of the Estate of BERTSELL KITTLE, Deceased, *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, United Mine Workers of America, (hereinafter UMWA), in opposition to the Petition for Writ of Certiorari filed herein respectfully repre-

sents that UMWA has served notice of intent to file Petition for Writ of Certiorari with respect to all of the cases, including the *Kinty Trucking Company* (hereinafter "*Kinty*") and *Kittle* cases, which were decided by the United States Court of Appeals for the Fourth Circuit.

The petitioners, Kinty and Kittle, correctly appended the opinion and decision filed by the Fourth Circuit, and correctly set forth that this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 2101(c).

The petitioners also correctly set forth that the basis for federal jurisdiction below was under 29 U.S.C. § 187(b).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

UMWA disagrees with the questions presented by petitioners inasmuch as the questions do not fully set forth the facts relating to UMWA's claim that both Kinty and Kittle were allies. The correct wording of the questions should be as follows:

In the *Kinty* case, was it error for the Trial Judge to refuse to submit the "ally" defense to the jury in a trial alleging a Section 303 violation and instead to find as a matter of law that independent contractors were "neutral employers" in a labor dispute between a union and an employer engaged in the business of producing and selling coal who, as an essential part of that business, transported the coal from the mines to its processing tipple by means of trucks operated by its own employees and by trucks owned by independent contractors who employed their own drivers, hauled solely for the coal producer, performed other services

including participation in contract negotiations between the union and the coal producer, and, on behalf of the producer, sought to induce the producer's employees to return to work.

In the *Kittle* case, was it error for the Trial Judge to refuse to submit the "ally" defense to the jury in a trial alleging a Section 303 violation and instead to find as a matter of law that independent contractors were "neutral employers" in a labor dispute between a union and an employer engaged in the business of producing and selling coal who, as an essential part of that business, transported the coal from the mines to its processing tipple by means of trucks operated by its own employees and by trucks owned by independent contractors who employed their own drivers, and hauled solely for the coal producer.

STATEMENT OF THE CASE

Over the opposition of UMWA, the District Court consolidated ten cases for trial by a jury. The jury found in favor of the UMWA in five of these cases and in favor of the plaintiffs in the five remaining cases, including the petitioners herein. UMWA appealed the five adverse judgments. The Fourth Circuit reversed and remanded the *Kinty* and *Kittle* cases for a new trial on the ground that the District Court failed to submit to the jury the issue of whether Kinty and Kittle were "neutral employers" within the meaning of § 303 of the Labor Management Relations Act of 1947. The Fourth Circuit affirmed the judgments against UMWA in two other cases, remanded a third case solely for the purpose of reducing the amount of the damages and reversed and remanded the *Kinty* and *Kittle* cases for a new trial. UMWA has served notice of intent to file a Petition

for Certiorari in all five of the cases which will include questions that would require a determination by this Court of a definition of a "neutral employer" under the so-called "ally" doctrine.

STATEMENT OF THE FACTS

The C&P Coal Company (hereinafter "C&P") operated three strip mines near Flemington, West Virginia. C&P stripped the coal and then transported it by truck from its strip mines to its tipples located on a railroad approximately four miles from the mines, where the coal was processed and loaded into railroad cars and shipped to the consumer. C&P operated its own fleet of trucks using its employees as truck drivers and also subcontracted with Kinty and Kittle to use their trucks and their employees to haul the coal from the strip mines to the tipple. Kinty and Kittle each owned three trucks; each drove one of their own trucks and hired other drivers for the remaining two trucks. Each paid their own employees and were in turn paid by C&P on a tonnage basis. Their trucks were parked, when not in use, on the premises of C&P. Kinty also performed other work such as running a grader, cleaning coal, or whatever he was told to do by C&P. Because of the nature of the work, the employees required little or no supervision. After C&P's employees began a work stoppage at the strip mines, they and the employees of Kinty and Kittle executed cards authorizing UMWA to represent them in collective bargaining. During the work stoppage, Kinty, on behalf of C&P, contacted some of C&P's employees and urged them to return to work. Kinty also sat in on the contract negotiations between C&P and the UMWA.

The work stoppage at C&P began when C&P's employees and Kinty's employees objected to the wages and working conditions and wanted a union. C&P sent the employees home and the work stoppage began. Unfair labor practice charges were filed against C&P and, under a settlement with the NLRB, C&P paid back wages to their own employees and to the employees of Kinty and Kittle.

ARGUMENT

UMWA's appeal to the Fourth Circuit was based in part upon the erroneous charge given to the jury describing the prohibitions of § 303, which included the definition of a neutral employer, and, further, UMWA's appeal was based upon the failure of the Court to submit this issue to the jury. Over UMWA's objection, the District Court charged the jury that the employee of a secondary employer was, for example, "the employee of the hauler; is engaged in his employment; he works for an independent miner which is called a hauler or a trucker; has nothing to do with the tipple owner or the other person; no legal connection with him; is just an independent hauler, the union cannot . . ., either induce or encourage the employees of any employer to engage in a strike, see, that is the employees of the hauler of the coal," and that Kinty and Kittle "were secondary employers, they had people working for them driving their trucks." The District Court then instructed the jury that C&P (the coal producer) was a primary employer and that the Act proscribes picketing at the premises of the primary employer unless it [the union] exercises that right consistent with the right of the neutral employers to remain uninvolved in the dispute and that a union

cannot escape the proscriptions of the Act by claiming to organize the coal producers and the transporters of the coal. The District Court refused to charge the jury that any employer in cahoots with, or acting as a part of, [a primary employer] was not a "neutral employer" within the meaning of § 303.

UMWA argued that Kinty and Kittle were "allies" of C&P regardless of the fact that there was no "legal connection" between the two employers. At least, there was sufficient evidence to require an "ally" charge to the jury. This presents an important question of law that has not heretofore been decided by this Court and has caused the Circuits and the Board great difficulty. The question is under what set of facts can two employers be deemed so integrated operationally that for the purposes of a secondary boycott, they must be deemed primary employers or "allies". This question has been dealt with by the various Circuits in *Teamsters Local 24* v. *NLRB,* 266 F.2d 675 (D.C. Cir. 1959); *Laborers' International Union of North America, Local 859* v. *NLRB,* 446 F.2d 1319 (D.C. Cir. 1971); *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971); *Carpet, Linoleum, S.T. and R.F.C.L., Local Union No. 419* v. *NLRB,* 467 F.2d 392 (D.C. Cir. 1972); *NLRB* v. *Teamsters Local 810,* 460 F.2d 1 (2d Cir. 1972); *Teamsters Local 723* v. *Empire State Express, Inc.,* 293 F.2d 414 (5th Cir. 1961); but no clear definition has been found.

One of the crucial factual determinations in deciding the "ally" question is described in *Local 419* v. *NLRB, supra,* wherein the Board and the D. C. Circuit found that employees of the independent contractors involved were neutral employees, because the prime contractor did not have employees doing the same work as the employees of the independent contractor, and, further, that the independent contractor could and did turn down work and worked for other companies. These facts are absent in the *Kinty* and *Kittle* cases.

Crucial to the question herein is that the transportation of the coal from the mine to the tipple is but a part of the business operations of C&P. Some coal operators use trucks; others use conveyor belts, depending upon the physical operation of the business. The truck drivers are part of the bargaining unit and are included in the collective bargaining agreements that UMWA has with all coal operators. It is unlike the situation where the independent truck haulers are employed by some other employer, such as a consumer of coal, or an independent tipple operator which purchases the coal from the producer and then processes and transports it to the consumers.

Although the Fourth Circuit did not address itself to the issue of the correctness of the District Court's definition of a neutral employer, it did reverse and remand the cases for a new trial because of the failure of the District Court to submit this issue to the jury. It can be argued that, since there is no dispute as to the facts, the issue became a question of law. However, if this Court grants UMWA's petition for certiorari in all of the five cases on the other questions that will be raised therein, the "ally" question will be included in one of the questions. Therefore, it may be proper to grant this petition, as well as UMWA's petition, and the entire matter disposed of at one time.

If UMWA's petition is denied, the *Kinty* and *Kittle* cases should be rejected until there has been a submission to the jury of the factual questions involved under a proper charge as to the definition of a "neutral employer" within the meaning of Section 303.

CONCLUSION

For the reasons assigned, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December 29, 1976